No. 85-1656 (5)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

O. L. MCCOTTER, Director
Texas Department of Corrections,

Petitioner,

—v.—

GREGORY ALLEN PETTY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIE UNION AND THE TEXAS CIVIL LIBERTIES UNION, AMICI CURIAE IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether, in a case in which some of a pro se habeas corpus applicant's allegations of fact come to light on appeal, it is within the sound discretion of the circuit court to remand to the district court to allow the prisoner an opportunity to amend, if the circuit court finds the circumstances warrant a remand in the interests of justice.

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INTEREST OF AMICI

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 members, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The Texas Civil Liberties Union is one of its state affiliates. The ACLU has long worked to protect the rights of criminal defendants and has filed many briefs, as counsel for individual litigants and as amicus curiae, in cases requiring the construction of federal statutes and rules and the interpretation of federal constitutional provisions related to criminal cases and the law of federal habeas corpus.

With the consent of the parties, indicated by letters lodged with the Clerk of this Court, we file this brief amicus curiae in support of the respondent.

STATEMENT OF THE CASE

The respondent, Gregory Allen Petty, is a Texas state prisoner serving a fifty-year sentence imposed in 1979 after he was convicted of aggravated robbery in a jury trial. Mr. Petty claims that his trial attorney rendered ineffective assistance in violation of the Sixth Amendment. Petty duly raised this federal claim in a pro se application for state habeas corpus relief; that application was denied by the Texas Court of Criminal Appeals in 1983.

On March 7, 1984, Petty raised the same claim in federal habeas corpus. He specifically alleged that his attorney had conferred with him only once before trial and on that occasion had urged him to plead guilty, that she failed to interview prospective defense witnesses, and that she was unprepared for trial before a jury. Petty's application was referred to a

magistrate, whose report, filed on April 24, 1984, recommended that the Sixth Amendment claim be denied because of Petty's failure to allege sufficient facts. The magistrate faulted Petty for failing to identify the witnesses that counsel might have interviewed or to identify other trial preparations that counsel might have made. In the magistrate's view, Petty had failed to demonstrate "any actual adverse impact upon fairness of his trial" resulting from counsel's claimed deficiencies.

Approximately two weeks later, on May 14, 1984, this Court held in Strickland v. Washington, 466 U.S. 668 (1984), that habeas applicants raising ineffective assistance claims must "show" both that counsel's performance was deficient and that counsel's deficient performance "prejudiced" the defense. On that same day, the district court accepted the magistrate's recommendation in this case.

In a pro se brief to the Fifth Circuit on appeal, received by the circuit court on November 8, 1984, Petty elaborated on his Sixth Amendment claim in light of Strickland. In that brief, he alleged that he had been committed to mental institutions on three separate occasions and had undergone out-patient psychiatric care for a number of years. If his trial attorney had investigated more thoroughly, he asserted, she would have developed evidence bearing on Petty's capacity to entertain the mental state essential for the offense of which he was charged.[1]

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[1] Petty also contended that counsel failed to investigate the way in which he had lost teeth after his arrest and thus failed properly to cross-examine the alleged victim, whose identification of Petty as the perpetrator depended in part on a recollection that the assailant had several missing teeth. The circuit court rejected that argument, and it does not figure in the Director's petition for review here. There is no cross-petition by Mr. Petty.

While Petty's appeal was pending before the Fifth Circuit, on November 18, 1985, this Court decided Hill v. Lockhart, 106 S. Ct. 366 (1985), in which it extended the two-prong formulation in Strickland to cases in which prisoners complain that counsel rendered ineffective assistance in connection with a plea of guilty. The Court affirmed the denial of habeas relief in Hill, at least in part on the ground that the prisoner in that case had not "alleged" sufficient "prejudice" to win an evidentiary hearing on his Sixth Amendment claim.

The Fifth Circuit addressed Petty's appeal still later, on January 3, 1986, and remanded the case to the district court so that Petty could be accorded an opportunity to amend his application to include allegations concerning his psychiatric history. The panel noted that if Petty had raised those allegations at the district

court level, he would have been entitled to an evidentiary hearing to determine whether counsel's failure to investigate had caused her to overlook a valid insanity defense at trial. The panel also took the view, however, that Petty's allegations should not be considered for the first time on appeal. Recognizing that Petty had been without professional representation in the district court, the circuit panel exercised discretion to remand the matter so that the prisoner, now represented by assigned counsel, could amend his habeas petition to include the new allegations.[2]

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[2] The circuit appointed counsel to represent Petty on appeal in this habeas action. Petty did not, however, have professional assistance in the preparation of his habeas petition or during any proceedings at the district court level. His specific allegations regarding prejudice flowing from defense counsel's failure to investigate were made in Petty's own pro se brief in the Fifth Circuit.

The circuit took note that such an amendment might raise exhaustion doctrine difficulties. Accordingly, the circuit made it clear that the district court should allow the warden to complain that Petty's allegations of "prejudice" had not been raised in state court.

This Court then granted the Director's petition for certiorari to review the circuit panel's disposition of Petty's appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

The problem presented by this case is a familiar one. Indigent state prisoners typically have no professional guidance in the preparation of federal habeas petitions and, accordingly, often present the district courts with pleadings lacking the polish generally expected from lawyers. Pro se prisoners also frequently fail to discern the inadequacies in their pleadings when they are identified in the custodian's response or, as in this case, a subsequent magistrate's report.

Federal courts like the Fifth Circuit, charged with implementing Congress' desire for a meaningful system of postconviction review in habeas, are experienced in handling procedural problems of this kind in a manner that protects all the interests at stake. This requires flexibility, discretion, and common sense. Thus

pleadings drafted by undereducated prisoners in their cells are not held to the standards ordinarily applied to lawyers; inconsequential litigation errors by pro se prisoners may be overlooked or handled in an ad hoc fashion groomed to the circumstances of a particular case. The courts are assisted and encouraged in this by especially flexible rules for habeas actions, promulgated by Congress in 1976.

The Fifth Circuit's disposition of the instant case is an excellent illustration of the entirely appropriate means by which the lower courts orchestrate habeas litigation on a daily basis. Our purpose in this brief is only to underscore the realism and fairness of the circuit court's actions. The Director asks the Court to hold pro se prisoners to litigation standards far more rigid than those applicable in ordinary civil litigation, in which opposing litigants are typically

represented by professional litigators. We urge the Court to reject this attempt to import into habeas practice rigid, indeed harsh, procedural requirements that ignore the realities of pro se litigation.

The Director makes two arguments: (1) that pro se habeas petitions which fail to allege specific prejudice flowing from defense counsel's substandard performance must be dismissed on the merits; (2) that if specific allegations going to prejudice come to light at the appellate level, the circuit courts lack the flexibility and discretion to allow a remand so that a petition can be amended.

The Director's initial contention is not merely wrong; it is, on the facts presented here, simply beside the point. The question in this case is not whether Mr. Petty's original allegations were sufficient to require an evidentiary hearing in the district court; the question

is whether the circumstances warranted more than summary treatment by the circuit panel on appeal. In any event, district courts have long had discretion to order hearings in habeas cases in which prisoners' applications are not sufficient to entitle them to such a hearing as a matter of right. Indeed, the habeas rules are founded precisely on the recognition that pro se litigants will be unable to provide the court and opposing counsel with all the information that may be necessary for full and fair adjudication. It is for that reason that the rules emphasize flexibility. This Court, too, has long directed the lower courts to apply less stringent pleading standards to pro se habeas applicants than to litigants represented by lawyers.

Second, and more to the point in the present case, any flaws identified in a pro se prisoner's application at the appellate

level can and should be handled in the appellate court's similarly broad discretion, with appreciation of the prisoner's disabilities and attention to the substantive interests of all parties. The Fifth Circuit did no more than remand to the district court for the express purpose of allowing Mr. Petty an opportunity to present the trial court and opposing counsel with a more detailed account of his claim. Such an order was a sound exercise of case-management discretion--particularly in this instance, when the pleading standards applicable to Sixth Amendment claims were only developing during the pendency of Mr. Petty's application, and, certainly, were unclear at the time he filed his petition in the district court. No genuine, substantive interest on the Director's part was jeopardized by the disposition below.

ARGUMENT

I. THE RIGID FACT-PLEADING STANDARDS URGED ON THE COURT IN THIS CASE FOR APPLICATION TO PRO SE HABEAS CORPUS PETITIONS ARE INCONSISTENT WITH THIS COURT'S PRECEDENTS AND THE HABEAS CORPUS RULES

Mr. Petty's pro se application for federal habeas relief in this case clearly alleged that he is in custody in violation of the Sixth Amendment, because his defense attorney rendered ineffective assistance at trial. Petty supported that claim in the district court with precise allegations of fact, namely that counsel consulted with him only once, failed to interview potential defense witnesses, and was unprepared for trial.

The Director argues, however, that more was required. Insisting that habeas applicants claiming ineffective assistance can succeed only by showing both that counsel's performance was substandard and

that that performance undermined confidence in the outcome of the trial, the Director contends that Petty's original petition should have spelled out how it was that counsel's failure to prepare for trial "prejudiced" Petty before the jury. The necessary outcome for any petitioner whose application fails this rigid pleading requirement, the Director insists, must be dismissal on the merits.

The Director's route to this conclusion is deceptively simple. This Court held in Townsend v. Sain, 373 U.S. 293 (1963), that habeas applicants have a right to a hearing only if they allege facts which, if true, would entitle them to relief. The applicable habeas rule, §2254 Rule 2(c), instructs prisoners not only to specify the grounds on which they seek relief, but to set forth the "facts" supporting those grounds. According to the Director, every habeas applicant must therefore parse the language of this Court's precedents

regarding the substantive claims they wish to pursue, identify the components of a successful collateral attack, and then include in their habeas petitions precise allegations touching every aspect of their claims. Since this Court's analysis of ineffective assistance claims contemplates both an examination of counsel's performance and an appraisal of the consequences of substandard representation, and since Mr. Petty focused on the former, Petty's original pleading was, by the Director's account, insufficient.

The Director concedes that his position may seem harsh. Professional litigators in ordinary civil litigation need offer only a "short and plain statement" of their clients' claims; fact-pleading is no longer required. It is even discouraged. Yet more demanding standards are appropriate in habeas, according to the Director, in order to allow the district courts to "screen" an alleged "inundation of litigation" in habeas.

The Director's argument is misguided at each of its critical junctures.

1.

The Director's discussion of Townsend assumes, incorrectly, that the question in this case is whether Mr. Petty was entitled as a matter of right to a federal evidentiary hearing on the strength of his original application for habeas relief. That simply is not the issue. In reviewing the Fifth Circuit's disposition of Petty's appeal, this Court must decide not whether Petty's petition might have been dismissed without a hearing, but whether the circuit court had discretion to deal with the matter more sympathetically. Townsend's rule for determining when a habeas hearing must be held is inapposite; the applicable principle, reaffirmed in Townsend, is that the habeas courts always retain power to hold evidentiary hearings in their discretion.

The Director's reliance on Rule 2(c) is also flawed. Although that rule does ask habeas applicants to set forth factual support for their claims, it also explicitly warns prisoners that they should provide the court only with a "summary" of what they wish an opportunity to prove in a hearing. The notion that a "summary" within the meaning of Rule 2(c) must ineluctably include a precise match of the elements of substantive claims and factual allegations in support would be troubling if habeas applicants were represented by experienced counsel skilled in constructing sophisticated pleadings. Given that undereducated prisoners like Mr. Petty are forced to find their own way, the Director's reading of Rule 2(c) is fatuous. No one reasonably can think that pro se habeas applicants would read Rule

2(c) to mean what it quite obviously does not say.

The Director's contention regarding Rule 2(c) is not only mistaken; it reveals a deeper misconception regarding the framework for appraising pro se habeas applications established by the habeas rules generally. Far from directing the district courts to fly-speck habeas applications for conformity to precise pleading rules and to dismiss nonconforming petitions summarily, Rule 2(c) merely describes the first stage of a carefully-tailored process, promulgated by Congress, by which the habeas courts consider crudely-drawn documents fashioned by undereducated prison inmates.[3]

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[3] The Director's explanation of the need for a screening device, the weight of habeas litigation, is simply out of date. Sophisticated analysis of recent data indicates that the rate of habeas filings has declined over the past few years--while the population of state prisons has soared. See Resnik, Tiers, 57 So. Calif. L. Rev. 837, 939-51 (1984).

First, the habeas rules anticipate that pro se applicants will be unable to draft petitions providing the court, and the respondent, with all the information that may be needed for full and fair adjudication. That is why Rule 2(c) asks only for a "summary" of the facts as the applicant sees them and why the form provided to pro se applicants directs prisoners to state their claims only "briefly." Pro se litigants are not expected to analyze this Court's precedents, to extract and distinguish the several elements of constitutional claims, to identify relevant facts, and then to bring the product of their labors to bear upon their own cases. Rather, prisoners are told only to state the substance of their claims, briefly and summarily.

Second, the habeas rules establish various means of obtaining an elaboration of pro se applicants' claims after a

petition is filed. Rule 4 authorizes the court to entertain special pleadings from the custodian, including a motion for a more definite statement of the claim pursuant to Rule 12(e) of the Federal Rules of Civil Procedure.[4] Rule 6 provides for thorough discovery on leave of court, and Rule 7 establishes a mechanism for expanding the record still further if the circumstances are appropriate. These rules plainly contemplate that pro se litigants in habeas will not produce initial pleadings and supporting data that would be expected in ordinary litigation in which the moving party is professionally represented. They recognize that pro se applications may be incomplete and, accordingly, establish machinery by which the court and the custodian can clarify what is at stake and deal with claims fairly.

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[4] See §2254 Rule 11 (explaining that the civil rules may be applied in habeas actions when they are "not inconsistent" with the habeas rules).

The Director ignores this Court's decision in Haines v. Kerner, 404 U.S. 519 (1972). In Haines, the Court recognized and endorsed the tradition under which the habeas courts hold pro se applicants to "less stringent standards" than are applied to "formal pleadings drafted by lawyers." The habeas courts may often read a pro se applicant's crude petition in the most favorable light, finding it to allege sufficient facts to withstand dismissal.[5]

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[5] The Director suggests that Haines comes into play only after a petition has been found to meet stringent pleading standards and, at that point, admonishes the district courts not to discount well-pleaded petitions because the veracity of their allegations appears questionable. Yet the Haines per curiam focuses explicitly on the specificity of a petition's allegations and says nothing about the resolution, at this stage, of doubts regarding the applicant's veracity.

* * * *

This brief description, rather than the Director's narrow vision, begins to capture the richness of the framework within which the lower federal courts grapple with pro se habeas corpus litigation. We should be surprised if any less flexible process could be acceptable--to Congress, to the lower federal courts, or, certainly, to this Court. If prisoners' access to the federal forum in habeas is to be meaningful, not illusory, the vexing problems faced by pro se litigants must be appreciated and mitigated by realistic federal judges treating such applications as "law and justice require." 28 U.S.C. §2243.

In this instance, Mr. Petty should be credited with providing the district court and the Director with a fair account of his

complaints concerning his defense attorney. The record reflects no uncertainty regarding the substance of his claim. The Director filed no request for elaboration. While the district court faulted Petty for failing to explain why he thought counsel's deficiencies had affected the trial, that court would have been warranted in reading Petty's contention that his attorney had not investigated thoroughly to allege, implicitly, that such an investigation would have turned up evidence useful to the defense.[6] It is hard, in fact, to understand Petty's claim in any other way. At all events, of course, the Fifth Circuit remanded the case to the district court to permit Mr. Petty to clarify his contentions regarding the effect of counsel's failure to

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[6] Again, however, the sufficiency of Petty's original allegations is not before the Court.

investigate. Accordingly, even if this Court should conclude that Petty's original application was insufficient, there is no basis for reversing the judgment below.[7] The substantive standards for pleading in ineffective assistance claims are not directly in issue here. The discretion of the circuit courts to manage their dockets is.

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[7] The Director seizes upon a single sentence in the Fifth Circuit's opinion, to the effect that "Strickland requires that prejudice be proved, not pleaded." 779 F.2d at 302. That statement is accurate, of course, inasmuch as it says nothing of any further requirement indicated by Hill. At all events, this Court reviews judgments, not opinions.

II. THE FIFTH CIRCUIT'S REMAND TO PERMIT AMENDMENT IN THIS CASE WAS CONSISTENT WITH PRUDENT CASE MANAGEMENT AND AFFECTED NO LEGITIMATE INTEREST ON THE DIRECTOR'S PART

As a second ground of complaint, the Director insists that the Fifth Circuit should have ignored Mr. Petty's more specific allegations regarding the effect of his attorney's failure to investigate his psychiatric history, because Petty clarified his contentions in that respect in his pro se brief on appeal.

The Director's argument here is in three parts: (1) that the circuit's action amounted to entertaining at the appellate level claims not seasonably raised in the district court; (2) that Petty bypassed an opportunity to amend his petition at the district level; and (3) that the remand thwarted the Director's opportunity to plead abuse of the writ in response to Petty's "new" claim of prejudice flowing

from counsel's failure to investigate. None of these points is sound.

1.

There is a good deal of difference between the sin of which the Director charges the circuit (determining a claim raised for the first time on appeal) and the dispensation the circuit actually extended (a remand and permission to amend to elaborate on a claim).

Nothing in the federal rules or in case law bars a federal court from exercising prudence in the disposition of cases on its docket. In this instance, a pro se habeas applicant had done his level best in the district court and, when he realized that he had been turned away at that level on the basis of an omission from his pleading, tried as best he could to correct that oversight before the next court to which he

came. The circuit hardly displayed inappropriate sympathy in such a case merely by remanding for purposes of an amendment.

The shortcoming said to exist in Petty's petition, moreover, was entirely understandable in the peculiar circumstances of this case. Neither Strickland nor Hill had been decided when Petty filed his original petition: Strickland was handed down on the very day the district court dismissed; Hill was decided after Petty filed his appellate brief. Thus the nature of the substantive claim Petty sought to raise, and certainly the attendant pleading standards he might be expected to meet, were in flux at the very time he acted, as a pro se petitioner, on his own behalf. In these circumstances, the Fifth Circuit's exercise of discretion

was not merely acceptable; it was the only reasonable and just course available.[8]

2.

The Director's argument that Petty had notice of the need to raise his specific allegations regarding "prejudice" at the district level is equally unavailing. Neither the district court nor, certainly, the Director actually notified Petty of any requirement that he file a more complete pleading. The only basis for the Director's contention is that the magistrate's report, filed two weeks before the district court's judgment, recommended dismissal in part on the ground that Petty had not sufficiently explained the consequences of counsel's deficiencies.

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[8] This case presents no question regarding the retrospective application of Strickland or Hill. We note the timing of those decisions only to place the disposition below in proper context.

That report, according to the Director, should have moved Petty to amend his petition.

The trouble with this argument is the same as with the Director's other contentions. It is unrealistic. First, the magistrate's report did not explain to this pro se litigant that his pleading was inadequate and that he might move to amend it in time to avoid dismissal. On the contrary, the report included only the usual boilerplate to the effect that the parties could file objections with the court within ten days. It offends reason to think that a prisoner in Petty's place could read explanations of that kind and understand that he might now do something entirely different. Perhaps an experienced litigator might have discerned the danger and seized the opportunity to attempt an eleventh hour amendment. But not a prisoner in his cell.

Second, the contention that Petty, or any prisoner, could have done anything in response to the magistrate's report is, again, unrealistic. The confusion and delays surrounding prisoners' mail are a matter of public record. The record does not show when Petty actually received the report; nor does it reflect the time he had to decipher the magistrate's language, to identify the implications, to locate a means of avoiding dismissal, and to get a motion for amendment back to the clerk. Yet in all fairness, it is simply unrealistic to think that Petty had a genuine opportunity to do what the Director insists he should have done.

3.

The Director's final argument is that the remand undercuts his opportunity to plead "abuse of the writ" pursuant to 28 U.S.C. §2244(b) and §2254 Rule 9(b). The

statute and the rule, of course, codify the standards for multiple collateral petitions established by this Court in Sanders v. United States, 373 U.S. 1 (1963). See Rose v. Lundy, 455 U.S. 509, 521 (1982). Those standards are familiar. First, in cases in which an applicant files a successive petition raising a claim dismissed on the merits in a previous habeas action, a habeas court has power to reconsider the claim, but may dismiss in its discretion unless the ends of justice would be served by reaching the merits a second time. Second, in cases in which an applicant asserts a claim that might have been, but was not, raised in a prior application, a habeas court again has power to reach the merits, but may dismiss if the petitioner's failure to assert the claim in the previous action constituted an abuse of the writ.

Initially, the Director mischaracterizes his argument in this case as falling under the second, "abuse of the writ" standard

described above. Evidently, the Director conceives of Mr. Petty's allegation that an investigation of his psychiatric background would have turned up evidence supporting an insanity defense as a "new or different" claim for relief, independent of the ineffective assistance of counsel claim Petty raised initially. On this understanding, the Director complains that the opportunity accorded to Petty to amend his petition in this proceeding amounts to a chance to add a new claim--after, by the Director's account, his original application has been denied on the merits.[9] If, in

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[9] The Director refers to Petty's allegations as not only "new," but "unexhausted"--intimating that the remand allowed by the circuit court raised difficulties associated with the exhaustion doctrine. That is not the case. The circuit expressly noted that the Director might complain that Petty had not raised his allegations regarding what a pre-trial investigation would have uncovered in state court and instructed the district court to entertain such an objection if it was filed. 779 F.2d at 302. Of course, the validity of any exhaustion issue was not before the court below and is not before this Court now.

contrast, the Fifth Circuit had affirmed the district court's denial of relief, Petty would be able to raise his "new" claim only in some future petition. And the Director would be able, in that future proceeding, to argue that Petty abused the habeas process by withholding this "new" claim from his original petition.[10]

This analysis is flawed in that Petty's allegations regarding what an investigation by counsel would have revealed merely elaborate upon his theory that counsel's failure to investigate amounted to ineffective assistance. The assertions on which the Director focuses have nothing to

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[10] Of course, the Fifth Circuit did not affirm the denial of relief. Rather, the circuit chose to remand the matter for the purpose of an amendment before making any judgment regarding the substantive sufficiency of Petty's allegations. To the extent the Director assumes in his argument that the circuit found an amendment essential to keep Petty's Sixth Amendment claim in court, the Director is reading into the disposition below a substantive legal determination that plainly was not made.

do with any "new" claim within the meaning of Sanders, §2244(b), and Rule 9(b). There is nothing whatever in this case to suggest a purpose on Petty's part deliberately to withhold an independent claim from his first petition in order to produce future proceedings "whose only purpose is to vex, harrass, or delay." Sanders, 373 U.S. at 18-19.

If the Director has any argument at all in this context, it is under the first Sanders standard. The opportunity to amend accorded to Mr. Petty by the Fifth Circuit avoids an immediate dismissal on the merits of his Sixth Amendment claim, unsupported by his allegation that an investigation by counsel would have turned up evidence of insanity. If Petty were to suffer such a dismissal now, and in future were to file a successive petition asserting these allegations, the Director might be in a position to argue that the successive

petition raises the same claim and that the merits should be reached only if reconsideration would serve the ends of justice.

Yet if this is the Director's argument, it misunderstands Sanders, the statute, and the rule at an even more fundamental level. The working idea is that, all things being equal, one full and fair adjudication of a habeas applicant's claim should suffice. Yet nothing in the relevant standards suggests that the initial treatment of a claim should be terminated unseasonably, that the unfavorable determination produced by such haste should be formalistically labeled "on the merits," and that later consideration should be cut off in the name of efficiency. The settled law in this context depends upon a full and fair adjudication in the first instance and only then permits summary dismissal of a successive petition.

The Fifth Circuit's action below is designed to foster just such full and fair treatment of Mr. Petty's Sixth Amendment claim--to marshal all his supporting allegations for a single, thoroughgoing examination by the district court. If, after he has done so and the court has given the case its considered judgment, the decision is unfavorable to the applicant, any future attempt on his part to relitigate the same claim may face demanding standards. Of course, Mr. Petty himself has suggested no intention of filing successive applications based on this same ineffective assistance claim. He seeks an authoritative determination of that claim in this, his first attempt to bring it before the federal courts. The specter of successive petitions is raised in this case only by the Director, and then only because the Director urges a

disposition that might lead Mr. Petty to try again.[11]

CONCLUSION

For the moment at least, Congress has declined to guarantee professional representation to state prisoners seeking federal habeas corpus relief. Instead, Congress has established compensating procedural machinery by which the habeas courts handle pro se applications with

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11 If the Director were to succeed here, and this Court were to instruct the lcwer courts to dismiss the current petition, Petty would be free to file a successive petition raising the same Sixth Amendment claim and supporting it with his allegations regarding what an investigation by counsel would have produced. While such a petition might elicit a motion to dismiss (on the ground that it raises the same claim once determined against the prisoner), Mr. Petty might well establish that the ends of justice could be served by reconsideration. For his claim that counsel's defaults frustrated a defense of insanity raises a serious question of his guilt or innocence of the offense charged in state court. Kuhlmann v. Wilson, 106 S. Ct. 2616 (1986).

patience and sensitivity, ensuring that prisoners are not turned away by steep procedural barriers that it would be just to deploy, if at all, only against experienced lawyers. The action taken by the Fifth Circuit in this case is a simple illustration of the scheme's operations. The disposition below was entirely appropriate and routine--in keeping with settled, sensible guidelines for pro se litigation promulgated by Congress and reinforced by this Court's precedents. Accordingly, the circuit judgment should be affirmed.

Respectfully submitted,

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